Rule of Law & US Constitutionalism.

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Basic Constitutional Concepts: Federalism, Separation of Powers, and the Rule of Law, section C
The Rule of Law and The Basic Principles of the American Constitution, pp. 347-54.
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James McClellan, *Liberty, Order, and Justice:*
***An Introduction to the Constitutional Principles of American Government* (2000).**
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C. The Rule of Law.

The America of 1787 inherited from medieval England the concept of rule of law, sometimes expressed as "a government of laws, not of men." One may trace the rise of this principle in English history all the way back to the signing of Magna Charta in the year 1215, when King John found it necessary to guarantee his obedience to English laws. For that matter, medieval English writers on law derived their understanding of the rule of law from ancient Roman jurisprudence.

"The king himself ought not to be under man but under God, and under the Law, because the Law makes the king. Therefore let the king render back to the Law what the Law gives him, namely, dominion and power; for there is no king where will, and not Law, wields dominion." So wrote Henry de Bracton, "the father of English law," about the year 1260, during the reign of Henry III. This teaching that law is superior to human rulers has run consistently through English politics and jurisprudence all the way down the centuries. It was rather belligerently asserted from time to time by the English colonies in North America.

This doctrine that no man is above the law applied not only to kings but also to legislative bodies and judges. Sir Edward Coke, we saw earlier, fiercely resisted not only attempts by King James I to interpret the law for himself but also Acts of Parliament that contravened the common law. Citing Bracton as an authority, he asserted that "the king must not be under any man, but under God and the law." In *Dr. Bonham's Case* (1610), Coke laid down the principle of judicial review, claiming that judges had a right, when interpreting Acts of Parliament, to declare them null and void if they conflicted with established principles of law and justice. "And it appears in our books," said Coke, "that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void."

That the English had turned their backs on their own tradition and respect for rule of law was the principal grievance of American colonial leaders. In his famous pamphlet *The Rights of the British Colonies Asserted and Proved* (1764), James Otis wrote:

To say the Parliament is absolute and arbitrary, is a contradiction. The Parliament cannot make 2 and 2 [equal] 5. … Parliaments are in all cases to *declare* what is good for the whole; but it is not the *declaration* of parliament that makes it so. There must be in every instance a higher authority—God.

Should an act of parliament be against any of *His* natural laws, which are *immutably* true, *their* declaration would be contrary to eternal truth, equity and justice, and consequently void.

Similar arguments were made by the State supreme court judges after 1776. Their attempts to nullify legislative enactments through the power of judicial review were largely unsuccessful, however, because most early State constitutions, like the English Constitution, followed the doctrine of legislative supremacy. Acts passed by the State legislatures were expected to conform to the State constitutions. But there were no provisions calling for the supremacy of the State's constitution over laws passed by the legislature should the judges decide that a law conflicted with the State's constitution. Thus, the absence of a supremacy clause in these State constitutions rendered the power of judicial review weak and ineffective.

The Federal Constitution of 1787 drastically changed the concept of constitutional government by introducing the principle of constitutional supremacy. Article VI declared that "This Constitution … Shall be the supreme law of the land." Laws passed by Congress, though supreme in relation to State constitutions and State laws, were ranked below the Constitution. Indeed, Article VI explicitly stated that such laws must conform to, and be made in pursuance of, the Constitution. Noting the significance of the Supremacy Clause, Chief Justice John Marshall held in the famous case of *Marbury v. Madison* (1803) that an Act of Congress contrary to the Constitution was not law:

[I]n declaring what shall be the supreme law of the land, the Constitution is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

It may thus be seen that the American Constitution and the power of judicial review are an extension of rule of law. The Constitution is law, the highest law, and the President, Congress, and the Federal Judiciary are bound by its terms. A government of laws and not of men is, then, the underlying principle of the American political and legal system.

This means that no person, however powerful or talented, can be allowed to act as if he were superior to the law of the land. Public decisions must be made upon the basis of law, and the laws must be general rules that everybody obeys, including those who make and enforce the law. A law that violates the Constitution is not a law and is not, therefore, enforced. This was the principle that Marshall followed in *Marbury v. Madison*. Likewise, rule of law means equality before the law. A law that singles out certain people for discriminatory treatment, or is so vague and uncertain that one cannot know what it requires, will not be treated as a law.

Rule of law, then, is not rule of *the* law, but a doctrine concerning what the law *ought* to be – a set of standards, in other words, to which the laws should conform. Merely because a tyrant refers to his commands and arbitrary rulings as "laws" does not make them so. The test is not what the rule is called, but whether the rule is general, known, and certain; and also whether it is prospective (applying to future conduct) and is applied equally. These are the essential attributes of good laws – laws that *restrain* but do not *coerce*, and give each individual sufficient room to be a thinking and valuing person, and to carry out his own plans and designs. This does not mean that the individual is free to do as he pleases; for liberty is not license. As the Framers knew well, absolute freedom would be the end of freedom, making it impossible for society to be orderly, safe from crime, secure from foreign attack, and effectively responsive to the physical, material, and spiritual needs of its members. Under God,

said the exponents of the rule of law, the law governs us; it is not by mere men that we ought to be governed; we can appeal from the whims and vagaries of human rulers to the unchanging law.

Though this is a grand principle of justice, often it is difficult to apply in practice. Passion, prejudice, and special interest sometimes determine the decisions of courts of law; judges, after all, are fallible human beings. As the Virginia orator John Randolph of Roanoke remarked sardonically during the 1820s, to say "laws, not men," is rather like saying "marriage, not women": the two cannot well be separated.

Yet the Framers at Philadelphia aspired to create a Federal government in which rule of law would prevail and men in power would be so restrained that they might not ignore or flout the law of the land. The Supreme Court of the United States was intended to be a watchdog of the Constitution which might guard the purity of the law and forcefully point out evasions or violations of the law by the other branches of government or by men in public office.

The Framers knew, too, the need for ensuring that the President of the United States, whose office they had established near the end of the Convention, would be under the law – not a law unto himself. The President's chief responsibility, in fact, is to enforce and uphold the law, and to "take care that the laws be faithfully executed." Whereas the members of Congress and the Federal Judiciary, and other Federal and State officials, all take an oath "to support this Constitution" (Article VI, Clause 3), the President – and the President alone – swears on the Bible (or affirms) that he will "preserve, protect and defend the Constitution" (Article II, Section 1, Clause 8).

Thus in the final analysis the nation looks to the President as the person ultimately responsible for upholding the rule of law and the supremacy of the Constitution. By making him Commander-in-Chief of the armed forces and by giving him the power to supervise the heads of the various departments of the executive branch, the Constitution also confers upon the President the means by which he may fulfill his law enforcement responsibilities.

By and large, America has enjoyed rule of law, not of men. No President of the United States has ever tried to make himself dictator or to extend his term of office unlawfully. Martial law – that is, a suspension of the law and the administration of justice by military authorities in times of war, rebellion, and disorder – has never been declared nationwide. No party or faction has ever seized control of the Federal government by force or violence. The Constitution of the United States has never been suspended or successfully defied on a large scale. Thus the rule of law has usually governed the country since 1787 – a record true of very few other countries of the world.

The Basic Principles of the American Constitution.

Federalism, separation of powers, and rule of law are the heart of the American Constitution. But there are other fundamental principles of the system as well, all of which contribute significantly toward the achievement of liberty, order, and justice. Viewing the Constitution as a whole, as the Framers perceived it, we observe that its essential features include the following:

First, the Constitution is based on the belief that the only legitimate constitution is that which originates with, and is controlled by, the people. Thus a constitution is more than a body of substantive rules and principles. As Thomas Paine wrote, "A constitution is not the act of a government, but of a

people constituting a government, and a government without a constitution is power without right." This principle is declared in the Preamble of the Constitution, which proclaims that the Constitution is ordained and established not by the government, but by "We the People."

One of the most remarkable debates ever staged in Congress occurred in March 1850 over the slavery question. This was the last joint appearance on the public stage of that great triumvirate, Henry Clay, Daniel Webster, and John C. Calhoun. Webster advocated compromise to save the Union, and his plea for moderation was heeded.

In this extraordinary picture, it is possible to identify each member because the artist used photographs to create an exact likeness. Webster is standing. To his left (front row, bottom right) is Stephen A. Douglas. Clay is directly behind Webster's uplifted hand, almost seeming to stare at the back of it. Calhoun is directly behind the fourth member (front row, left to right), and beside him, to his right, is Jefferson Davis. (Courtesy of the Library of Congress.)

Second, the United States Constitution subscribes to the view that the government must in all respects be politically responsible both to the States and to the governed. This is achieved through the election and impeachment process, with only the members of the House of Representatives being directly accountable to the electorate. Though not directly represented, the States exercise some influence by virtue of the Electoral College, control of the franchise, and the amendment process. Prior to the adoption of the Seventeenth Amendment in 1913, the States were also able to protect their interests in some instances by virtue of the fact that members of the Senate were indirectly elected by State legislatures rather than directly by the people.

Third, the Constitution rested on the proposition that all constitutional government is by definition limited government. A constitution is a legal, not just a political limitation on government; it is considered by many the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law. Parliamentary supremacy, identifying all law with legislation, is thus hostile to the American Constitution, which declares that the Constitution shall be the supreme law of the land.

Fourth, the Constitution embraced the view that in order to achieve limited government, the powers of government must be defined and distributed – that is, they must be enumerated, separated, and divided. A unitary and centralized government, or a government in which all the functions or functionaries were concentrated in a single office, was a government that invited despotism and would inevitably become tyrannical and corrupt. This tendency toward "tyranny in the head" might be prevented, or at least discouraged, through a separation of powers among the three branches of the Federal government, and a reservation to the States of those powers that were not delegated to the Federal government.

Conversely, the Framers were also mindful that in order to be limited, it did not follow that government must also be weak. Too little power was as dangerous as too much, and if left unattended might produce "anarchy in the parts," or a state of disorder into which the man on the white horse would ride to forge tyranny out of chaos. The solution for avoiding these extremes of too much and too little power was to balance power and to balance liberty and order, allocating to the people and to each unit of government a share of the national sovereignty.

Fifth, the American Constitution was premised on the seemingly unassailable assumption that the rights and liberties of the people would be protected because the powers of government were limited, and that a separate declaration of rights would therefore be an unnecessary and superfluous statement of an obvious truth. Since the government of the United States was to be one of enumerated powers, it was not thought necessary by the Philadelphia delegates to include a bill of rights among the provisions of the Constitution. "If, among the powers conferred," explained Thomas Cooley in his famous treatise *Constitutional Limitations* (1871), "there was none which would authorize or empower the government to deprive the citizen of any of those fundamental rights which it is the object and duty of government to protect and defend, and to insure which is the sole purpose of a bill of rights, it was thought to be at least unimportant to insert negative clauses in that instrument, inhibiting the government from assuming any such powers, since the mere failure to confer them would leave all such powers beyond the sphere of its constitutional authority." In short, the Constitution itself was a bill of rights because it limited the power of the Federal government.

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